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No. 85-492

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

ROBERT T. DEVEREAUX, ET AL.,
PETITIONERS-APPELLANTS,

v.

WILLIAM J. GEARY, ET AL.,
RESPONDENTS-APPELLANTS,
AND
PLAINTIFF-CLASS IN *CULBREATH* v. *DUKAKIS*,
INTERVENORS-APPELLEES.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

I. Whether the "collateral attack" doctrine is consistent with the Constitution's due process guarantee?

II. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 is subject to the remedial limitations contained in Section 706(g) of Title VII?

III. Whether racial quotas for promotional positions in state service are permissible remedies under Section 706(g) of Title VII?

IV. Whether a voluntary affirmative action plan involving state action violates the Equal Protection Clause of the Fourteenth Amendment?

List of Parties to the Proceeding Below.

The plaintiffs-appellants below were Robert T. Devereaux, William E. Kelley, John J. Bakey, Donald I. Dentremont, Jr. and Daniel J. Gately, Sr.

The defendants-appellees were William J. Geary, Commissioner of the Metropolitan District Commission, and Thomas E. Keogh, Superintendent of Police of the Metropolitan District Commission.

The intervenor-appellee was the plaintiff class in *Culbreath* v. *Dukakis*, CA 74-2463 (D.Ma).

The instant writ is submitted on behalf of Robert T. Devereaux, William E. Kelley, John J. Bakey, Donald I. Dentremont, Jr. and Daniel J. Gately, Sr.

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Citations to Opinions Below.

The decision of the United States Court of Appeals for the First Circuit is reported at 765 F.2d 268 (1st Cir. 1985), and is reproduced in Appendix A of this petition.

The memorandum and order of the United States District Court for the District of Massachusetts is reported at 596 F. Supp. 1481 (1984), and is reproduced in Appendix B of this petition.

Jurisdictional Statement.

The judgment of the United States Court of Appeals for the First Circuit was entered on June 24, 1985. This Court has jurisdiction over the instant petition pursuant to 29 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The issues presented by the instant petition include whether an individual's Fourteenth Amendment equal protection rights may be overridden by a consent decree, entered pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2002e *et seq.*, that establishes racial quotas for promotional appointments within a state police force. More specifically, the instant petition raises the issue of whether Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-5(g), authorizes a federal court to enter a consent judgment that overrides state civil service law by establishing racial quotas for promotional positions within the state workforce.

The texts of Amendment XIV, Section 1 of the United States Constitution and Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-5(g), are set out in Appendix C of this petition.

Statement of the Case.

In 1974 certain minority employees of the Commonwealth of Massachusetts brought an action against state officials, *Culbreath* v. *Dukakis*, CA No. 74-2463, challenging alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. Thereafter, the suit was certified as a class action, but the claims of the class were never tried. Rather, the parties stipulated to the entry by the district court of a consent judgment which was itself based on a stipulation of facts that was prefaced by the following:

> The parties believe that the stipulation of facts set forth below and acknowledged by the Court constitute findings of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.[1]

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[1] The plaintiffs in *Culbreath* did not bring their action under Title VII but, rather, asserted claims under §§ 1981 and 1983 of Title 42. In this regard, the First Circuit noted as follows:

> The plaintiff class in *Culbreath* originally grounded its claims on 42 U.S.C. §§ 1981, 1983, not on Title VII. About two years into the litigation, however, the Supreme Court ruled in *Washington* v. *Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1979), that in section 1981 and section 1983 actions, plaintiffs must prove intentional discrimination to recover. Since the *Culbreath* complaint did not contain allegations of intentional discrimination, the parties in *Culbreath* treated the action as one brought pursuant to Title VII. For purposes of this appeal, it is clear that the *Culbreath* consent decree was entered under Title VII and must be reviewed accordingly. *See* note 2, *infra*.

765 F.2d at 270 n.1.

In reference to the filling of promotional positions in the state agencies, the parties, in the *Culbreath* consent decree, provided, in part, as follows:

> (a) Whenever an appointing authority defendant makes requisition to fill by permanent or temporary appointment one or more positions covered by this Decree, including promotions, the appointing authority defendants will request and the Personnel Administrator shall promptly certify, in addition to the names certified pursuant to Civil Service Rule 11, or its successor, the names of a like number of minority individuals who are on an eligible list for such positions, in order of their standing. Using the certified names, the appointing authority shall employ throughout each year of the Decree and in every grade grouping, a complement of minorities equal to that year's goal for permanent appointments as specified in Attachment A.
>
> (b) Each appointing authority defendant shall, using the certified names referred to above for temporary appointments, and using other appropriate names for provisional appointments and provisional promotional appointments, employ by non-permanent appointments throughout each year of the Decree and in every grade grouping, a complement of qualified minority persons equal to that year's goal for such non-permanent appointments, as specified in Attachment A.

Ultimately, the consent decree was approved by the district court and entered as an order.

As a result of a competitive examination held on April 23, 1983, an eligibility list was established for the promotional position of police captain in the Metropolitan District Commission (hereinafter, "the MDC"), an agency of the Commonwealth of Massachusetts. The petitioners herein, five white police lieutenants who are employed by the MDC, occupied positions 3 through 5 on that list.[2] At various times prior to June 1984, the two lieutenants who were 1 and 2 on the list were promoted to captain. In June 1984, the MDC filled a temporary captain's position that had been designated by the MDC as a minority position. As a result of this designation, the position was given to a minority candidate who was number 6 on the eligibility list and, as such, would not have been otherwise eligible under applicable state law[3] to be considered for the temporary captain's position. The temporary captain's position was designated as a minority position because of the operation of the *Culbreath* consent decree. As a result of being bypassed for the captain's position, the petitioners commenced the suit that underlies the instant petition. In their suit, the petitioners contended that the state defendants, by making race the determinative selection factor, had deprived the petitioners of their Fourteenth Amendment equal protection rights and violated 42 U.S.C. § 1981.

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[2] Petitioners Devereaux and Kelley tied for position number 3 on the list, while petitioners Bakey and Dentremont tied for position number 4 and petitioner Gately occupied position number 5. *See* note 3, *infra*.

[3] When one position that is covered by state civil service law is to be filled, the Personnel Administrator, pursuant to M.G.L. c. 31, § 27 and the rules of the Civil Service Commission, certifies the top three candidates on a promotional list to the appointing authority who is required, in the normal course, to select from one of the three to fill the vacancy. If the list contains ties, all candidates occupying the top three remaining slots on the list are certified for consideration. Accordingly, it is possible for the Court to find, with certainty, that, but for the terms of the *Culbreath* consent decree, one of the named petitioners herein would have been appointed to the disputed captain's position.

The district court considered the petitioner's suit to be an attempt to intervene in *Culbreath* rather than a collateral attack on the consent decree. *See* 596 F.Supp. 1481, 1483 (D.Ma. 1984). The First Circuit concurred with the district court's characterization of the petitioners' suit and concluded, as had the district court, that the analysis and holding in *Stotts* did not extend to the terms of the consent decree that established racial quotas for promotional appointments within the MDC police. As such, the First Circuit held that *Stotts* did not so change the law of Title VII as to constitute an "unusual circumstance" that would justify intervention. *See* 765 F.2d at 271.

Reasons for Allowing the Writ.

By their suit, the petitioners attempted to place in issue the permissible scope of district court orders under Section 706(g) of Title VII. Thus, stated simply, the state defendants herein defended their admittedly racially motivated action based on the terms of the *Culbreath* consent decree that had been entered as an order of the district court pursuant to the remedial provisions of Title VII and that, as noted *supra*, contained provisions establishing racial quotas for promotional police appointments within the MDC.

The First Circuit, however, considered the petitioners' suit to be an attempt to intervene in *Culbreath* and, in addition, chose to analogize the court adopted and enforced consent decree to the type of voluntary affirmative action plan at issue in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).[4] Having established this analytical framework, the First

[4] In its opinion, the First Circuit mischaracterized the petitioners' position. Thus, the Court stated that it was the petitioners' contention that "the clear impli-

Circuit went on to limit the Court's holding in *Firefighters Local Union No. 1784* v. *Stotts*, ___ U.S. ___, 104 S.Ct. 2576 (1984), to the specific facts of the case and, therefore, found that racial quotas governing appointments to promotional positions in state agencies remained permissible terms for a Title VII consent decree. In so ruling, the First Circuit acknowledged its uncertainty regarding the intended scope of *Stotts*,[5] but re-

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cation of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan." 765 F.2d at 274. This was not the case. Rather, the petitioners contended that a consent decree, being a remedial order of the court, must comport with the remedial authority granted to the court by the operative statute. Stated another way, it was the petitioners' contention that a court's remedial authority does not expand simply because its order is entered with the consent of the parties. Therefore, in regards to the instant case, the petitioners contended that the court's remedial authority under Section 706(g) of Title VII had been constricted by *Stotts* and that this constriction had to be reflected in the terms of the consent decree. *See id.* at 271 n.2.

[5] In this regard, the First Circuit stated as follows:

> Plaintiffs argue that although *Stotts* may be factually distinguishable, the clear implication of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan.
>
> We are not so sure. It is not easy to determine from the plurality opinion in *Stotts* just how far a majority of the Court would want to go in the present situation.
>
> . . .
>
> We recognize, of course, that this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent. . . Unless we can say with greater certainty than is now possible that the decree, contrary to former assumptions, is invalid, it would seem better to leave it undisturbed, at least until the Supreme Court has shed more light in this area, which it quite possibly may do within the next term. *See Wygant* v. *Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985).

765 F.2d at 274-275 (footnote omitted).

solved that uncertainty in favor of racial quotas, relying, in large measure, on the absence of an expressed overrule of *United Steelworkers of America* v. *Weber*, by the Court in *Stotts*.[6]

The instant petition presents a number of issues, all of which have clear import beyond the facts of the instant dispute and any of which, standing alone, justify accepting the instant writ. First, the First Circuit's characterization of the petitioners' suit as an attempt to intervene in *Culbreath* followed from the Court's subsidiary conclusion that actions challenging practices allegedly authorized by a consent decree in another case are impermissable "collateral attacks" on the decree. There is now a conflict among the circuit courts of appeal regarding the propriety of the so-called "collateral attack doctrine". Particu-

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[6] With reference to the *Weber* issue, the First Circuit stated that —

> . . . the Court had earlier held in *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalances in employment categories. The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded, in the absence of any express pronouncement to the contrary, that *Weber* remains good law.

765 F.2d at 274-275 (footnote omitted), *citing EEOC* v. *Local 638*, 753 F.2d 1172, 1185-1186 (2d Cir. 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 487-488 (6th Cir. 1985); *Diaz* v. *American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984), *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 105 S.Ct. 2015 (1985); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S.Ct. 296 (1984).

larly in light of the due process implications of the application of the collateral attack doctrine, the Court should grant the instant writ to resolve the conflict among the circuits. Second, the First Circuit failed to distinguish the instant case, which arises out of a court entered and enforced consent decree and, as such, should involve the issue of the permissible scope of remedies under Section 706(g) of Title VII, from *United Steelworkers of America* v. *Weber*, wherein the Court considered whether the operation of a voluntary affirmative action plan, within the private sector, violated Title VII. The Court should grant the instant writ to address the issue of whether the remedial terms of a consent decree must conform to the statutory remedial limitations applicable in fully litigated cases. Third, the First Circuit, like a number of other circuit courts of appeal, read *Stotts* as disapproving only racial quotas that abrogate a bona fide seniority system protected under Section 703(h) of Title VII. The Court should grant the instant writ to give full import to the reasoning in and meaning of *Stotts*. Fourth, even if the Court concurs that the terms of a court enforced consent decree are not subject to the limitations on remedies under Section 706(g), the Court should grant the instant writ so that it may address one of the issues left open in *Weber*; that is, whether an affirmative action plan involving state action violates the Equal Protection Clause of the Fourteenth Amendment.

1. The Collateral Attack Doctrine Is Inconsistent With the Constitution's Due Process Guarantee.

In *Culbreath* v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980), the First Circuit, in *dicta*, noted that an individual that is aggrieved by the effects of the operation of a consent decree could not commence an independent action, since a "[c]ollateral attack on the decree [would] be impossible because only the district court supervising implementation of the decree will have sub-

ject matter jurisdiction to modify the decree." *Id.* at 22. In treating the petitioners' suit as an attempt to intervene in *Culbreath* rather than as an independent action, the First Circuit reaffirmed and applied its collateral attack doctrine. Other circuit courts of appeal also have approved the dismissal, on jurisdictional grounds, of actions challenging practices authorized by consent decrees in other cases. *See Thaggard* v. *City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied sub nom. Ashley* v. *City of Jackson*, 104 S.Ct. 225 (1983); *Dennison* v. *City of Los Angeles Department of Water & Power*, 658 F.2d 694, 695 (9th Cir. 1981); *Black & White Children of the Pontiac School System* v. *School District of the City of Pontiac*, 464 F.2d 1030, 1030-1031 (6th Cir. 1972) (*per curiam*); *Burns* v. *Board of School Commissioners of the City of Indianapolis*, 437 F.2d 1143, 1144 (7th Cir. 1971) (*per curiam*); *Prate* v. *Freedman*, 430 F. Supp. 1373, 1374-1375 (W.D.N.Y.), *aff'd without published opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *O'Burn* v. *Shapp*, 70 F.R.D. 549, 552-553 (E.D.Pa.), *aff'd without published opinion*, 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968 (1977).

However, in *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), the Eleventh Circuit rejected the collateral attack doctrine as inconsistent with the principles of res judicata and collateral estoppel which, it concluded, "apply to consent decrees as well as to ordinary judgments entered by a court." *Id.* at 1517. In this regard, the Eleventh Circuit stated as follows:

> The principles of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court. These doctrines prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of

> interests with such parties that their interests are deemed to have been litigated in those proceedings. A final judgment may not, however, bind a nonparty when his interests were not represented; thus, situations can arise where a judgment purporting to affect a nonparty must not be applied to him. There are, additionally, limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties.
>
> In applying these principles to consent decrees, some courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree. We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights. If we refuse to hear a discrimination claim by a person whose interests are not represented in the decree, we create an exception to the limitations we presently place on res judicata and collateral estoppel.

Id. at 1517-1518 (footnote omitted). The Eleventh Circuit's conclusion seemingly is supported by the Court's statement in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard", *id.* at 327 n.7, as well as buoyed by the dissent from the denial of certiorari in *Thaggard* v. *City of Jefferson*, wherein Justices Rehnquist and Brennan opined that the doctrine of "collateral attack" was contrary to the concept of due process of law as well as incon-

sistent with the general principles of preclusion. *See* 104 S.Ct. at 257-259.

The Court should grant the instant writ to lay to rest the "collateral attack doctrine".

2. The Instant Case, Like *Stotts*, Involves the Issue of a Court's Remedial Authority Under Section 706(g).

In *Stotts*, the Court seemingly adopted the proposition that since a consent decree is, in the final analysis, an order of the court, the terms of such a decree are subject to the remedial parameters of the statute upon which the decree is based. Thus, the Court stated as follows:

> "[T]he District's [sic] Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree.

104 S.Ct. at 2587 n.9, *quoting System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961). *See also* 104 S.Ct. at 2605 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial"); *id.* at 2594 n.3 (Stevens, Jr., concurring in the judgment) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII"); *System Federation No. 91* v. *Wright*, 364 U.S. at 652-653 ("The type of decree the parties bargained for is the same as the only type of decree a court can properly grant — one with all those strengths and infirmities of any litigated decree . . . [T]he court was not acting to enforce a promise but to enforce a statute").

However, despite the language in *Stotts* and despite the fact that a Title VII consent decree has all the indicia of a post-litigation remedial order, *see* discussion *infra*, the First Circuit analogized the instant consent decree to a voluntary affirmative action plan adopted by private parties. While the First Circuit is not alone in its failure to acknowledge that a consent decree, as a remedial order of the court, is subject to the limitations of the court's statutory remedial authority, *see, e.g., Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), its view surely is wrong.

In this regard, the consent decree, in the instant case, is grounded on court adopted findings "of such past practices of discrimination of both a judicial and administrative nature, sufficient to sustain an action under Title VII. . ." In turn, the district court has granted injunctive relief to enforce the terms of the decree as well as periodically modified and extended the decree.[7] Finally, the consent decree expressly has overridden state law. As such, the only substantive distinction between the *Culbreath* litigation and the resulting findings and remedy therein and the results of a traditional, adversarial Title VII litigation is that the state defendants in *Culbreath* chose to accede voluntarily to the court's findings and remedy.

In addition, and more importantly, in the instant case, it is the court, and not the state defendants, that is affecting adversely the petitioners' constitutional and state law rights. As a result, the petitioners are precluded effectively from even attempting to vindicate their rights under federal or state law, since the petitioners may not attack collaterally orders of the court, including consent decrees. *See, e.g., Culbreath* v.

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[7] The district court, in November, 1981, entered a *Stotts*-type order protecting minorities from the effect of budgetary cutbacks. In addition, the court, in August, 1982, extended the decree to the then newly formed Department of Social Services.

Dukakis, 630 F.2d at 22. *But see United States* v. *Jefferson County*, *supra*.

In contrast, in the case of a voluntary affirmative action plan, it is the employer that may be affecting adversely the rights of non-minorities. However, the employer cannot insulate its affirmative action plan from a collateral attack by non-minorities who might seek to vindicate their state law or federal rights. *See W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983) ("[A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent").

By analogizing the instant consent decree to a voluntary affirmative action plan, the First Circuit has permitted the plaintiff class in *Culbreath* and the state defendants to have the "best of both worlds", all to the detriment of the petitioners. Thus, the plaintiff class and the state defendants have the "benefits" of a decree that is insulated from collateral attack and that may be and has been modified and enforced by the court but do not have the "burdens" of the remedial limitations that are otherwise imposed on the court by the operative statute. The Court should grant the instant petition to remedy the fundamental unfairness that results from the lower court's refusal to conform the terms of the Title VII consent decree to the statutory restrictions that otherwise would govern court orders in fully litigated Title VII actions.

3. Racial Quotas for Promotional Positions in State Service Are Not Permissible Remedies Under Section 706(g) of Title VII.

In the aftermath of *Stotts*, several courts of appeal have considered the question of the meaning and application of

Stotts. Like the First Circuit herein, the courts have interpreted *Stotts* as prohibiting only remedial racial quotas that abridge rights under a bona fide seniority system protected by Section 703(h) of Title VII.[8] *See Turner* v. *Orr*, 759 F.2d 817, 824 (11th Cir. 1985); *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d at 486; *Diaz* v. *AT&T*, 752 F.2d 1356 n.5 (9th Cir. 1985) (dicta); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985) (dicta); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 105 S.Ct. 296 (1984) (dicta). Although the First Circuit, an noted *supra*, has conceded that it and the other circuit courts "could be mistaken in [their] reading of current precedent." 765 F.2d at 275.

In interpreting *Stotts* as only disapproving racial quotas that impinge on bona fide seniority systems, the circuit courts have relied on the fact that such systems are protected by Section 703(h) of Title VII.[9] However, the purpose of Section 703(h)

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[8] In this regard, the First Circuit stated that —

> . . . the affirmative action ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority system protected by section 703(h) of Title VII. Our case does not involve section 703(h) as there is no claimed conflict between a seniority plan and the remedies provided for in the decree.

765 F.2d at 273.

[9] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) provides —

> Notwithstanding any other provision of this [subchapter], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different

"was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Teamsters* v. *United States*, 431 U.S. 324, 352 (1977). As such, the Court expressly has cautioned that Section 703(h) may not be read, as the First Circuit has herein, as "limiting or qualifying the relief authorized under § 706(g)." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758-759 (1976). Indeed, to the extent the protections of Section 703(h) are relevant to the remedies available under Section 706(g), same include employer actions pursuant to "the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Thus, since there was, nor can be,[10] no claim that the promotional captain's examination did not meet the requirements for statutory protection under Section 703(h), said section clearly cannot provide the basis for distinguishing *Stotts* from the case at bar.

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locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability tests provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this [subchapter] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)) [29 USCS § 206(d)].

[10] The *Culbreath* consent decree contains provisions not only requiring that the state conduct a validation study before administering any examination, but also providing that the state and the plaintiff class must agree that the validation study complies with the decree. If the parties cannot agree on the issue compliance, the court determines the matter.

Since Section 703(h) obviously cannot provide the justification for treating racial quotas that impinge on a bona fide seniority system different from racial quotas that impinge on a nondiscriminatory, merit, promotional system, that justification must emminate, if at all, from Section 706(g). However, as discussed below, there is no logical basis for assuming that the congressional policy behind Section 706(g) may vary from situation to situation and, as such, the Court's definition of that policy in *Stotts* must have equal force regardless of the facts giving rise to the particular dispute.

In this regard, the Court, in part B of its *Stotts* decision, considered the scope of the trial court's remedial authority in a Title VII proceeding. The specific question considered was whether the trial court, through the mechanism of racial quotas, could award, in effect, competitive seniority to minority employees without a corresponding finding that those specific employees who would receive the award of competitive seniority had been victims of discrimination. This issue arose in *Stotts* when the court of appeals affirmed the issuance by the district court of the injunction barring the City of Memphis from following its seniority system in determining who was to be laid off, based on the court of appeals' belief that the district court could have ordered this type of racial quota had the Title VII action been litigated on the merits. Thus, the Court stated as follows:

> A second ground advanced by the Court of Appeals in support of the conclusion that the injunction could be entered notwithstanding its conflict with the seniority system was the assertion that "[i]t would be incongruous to hold that the use of the preferred means of resolving an employment discrimination action decreases the power of a court to order relief which vindicates the policies embodied within Title VII, and 42 U.S.C. §§ 1981 and 1983." 679 F.2d at

> 566. The court concluded that if the allegations in the complaint had been proved, the District Court could have entered an order overriding the seniority provisions. Therefore, the court reasoned, "[t]he trial court had the authority to override the Firefighter's Union seniority provisions to effectuate the purpose of the 1980 Decree." 679 F.2d at 566.

__ U.S. __, 104 S.Ct. at 2588.

In addressing this issue, the Court initially noted that while it had held in *Franks* v. *Bowman Transportation Co.*, and *Teamsters* v. *United States* that Section 703(h) of Title VII did not affect an individual discriminatee's right to be awarded competitive seniority, the Court in *Teamsters* v. *United States*, had "made clear that mere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." __ U.S. at __, 104 S.Ct. at 2588.

The Court then considered whether its "ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation." __ U.S. __, 104 S.Ct. at 2588-2589. In this regard, the Court concluded that the policy behind Section 706(g) "is to provide make-whole relief *only to those who have been actual victims of illegal discrimination*. . ." __ U.S. at __, 104 S.Ct. at 2589 (emphasis added). In support of this conclusion, the Court quoted four excerpts from the legislative history of Title VII.

First, the Court quoted the following floor remarks of Senator Humphrey:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted without relevant change as § 706(g)]. . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require. . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but is non-existent.

__ U.S. at __, 104 S.Ct. at 2589, *quoting* 110 Cong. Rec. 6549. Second, the Court cited a portion of an interpretive memorandum which it characterized as making "clear that a court was not authorized to give preferential treatment to non-victims." __ U.S. at __, 104 S.Ct. at 2589. The specific language cited was as follows:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of [Title VII]. This is stated expressly in the last sentence of section [706(g)]. . .

Id., *quoting* 110 Cong. Rec. 7214. Third, the Court quoted and emphasized the following portion of a memorandum describing the Title VII bill:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. *But Title VII does not permit the ordering of racial quotas in business or unions*. . . .

__ U.S. at __, 104 S.Ct. at 2589, *quoting* 110 Cong. Rec. 6566 (emphasis added by the Court). Lastly, the Court quoted with favor the following language from a bipartisan news letter:

> [U]nder title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title.

__ U.S. at __, 104 S.Ct. at 2590, *quoting* 110 Cong. Rec. 14465.

In addition to quoting the legislative history of Title VII, the Court majority specifically took issue with the dissent's contention that Congress, in the 1972 amendments to Title VII, had approved certain federal court decisions wherein the courts "had provided remedies to those who had not proven that they were victims." __ U.S. at __, 104 S.Ct. at 2590 n.15. In this regard, the Court noted the following:

> We have already rejected, however, the contention that Congress intended to codify all existing Title VII decisions when it made this brief statement. See *Teamsters, supra*, 431 U.S., at 354, n.39, 97 S.Ct.,

at 1864, n.39. Moreover, the statement on its face refers only to those sections not changed by the 1972 amendments. It cannot serve as a basis for discerning the effect of the changes that were made by the amendment. Finally, and of most importance, in a later portion of the same section-by-section analysis, the sponsors explained their view of existing law and the effect that the amendment would have on that law.

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present §706(g) *the courts have stressed that the scope of relief under that section of the Act is intended to make victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by consequences and effects of the unlawful employment practice be*, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.*, at 7168 (emphasis added).

As we noted in *Franks*, the 1972 amendments evidence "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible *the victims of racial discrimination*." 424 U.S., at 764, 96 S.Ct., at 1264 (emphasis added).

Id. (emphasis in original).

Accordingly, in *Stotts*, the Court examined the policy underlying Section 706(g) of Title VII. In undertaking this examination, the Court did *not* consider the narrow issue of what is the policy underlying Section 706(g) in cases involving layoffs and bona fide seniority systems. Rather, the Court sought to identify the general policy behind § 706(g) expressly for the purpose of determining whether its holding in *Teamsters* v. *United States* was "consistent with" that policy. *See* __ U.S. at __, 104 S.Ct. at 2588.[11]

In unmistakeable language, the Court held that the policy behind the remedial provision of Title VII is to provide relief only for the actual victims of discrimination. To suggest, as the circuit courts have done to date, that the Court in *Stotts* only articulated the policy underlying Section 706(g) for cases involving layoffs in the context of a bona fide seniority system is to ignore the clear and unequivocal language of the Court's opinion. The Court should grant the instant petition to give effect to the reasoning and clear import of *Stotts*.

4. A Voluntary Affirmative Action Plan Involving State Action Violates the Equal Protection Clause of the Fourteenth Amendment.

If the Court, like the First Circuit, considers the instant consent decree to be akin to a voluntary affirmative action plan and, as such, not subject to the remedial limitations contained in Section 706(g), the Court, nevertheless, should grant the instant petition to address one of the questions expressly left open by the Court in *United Steelworkers of America* v. *Weber*, i.e. whether the Equal Protection Clause of the Fourteenth Amendment forbids the state from imposing racial quotas pursuant to a voluntary affirmative action plan.

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[11] "Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII. . ."

In this regard, in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the Court stated that it had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307. In the instant case, it would seem clear and only fair that, if the *Culbreath* consent decree is not considered to be a court order under Section 706(g) of Title VII and, as such, subject to the remedial limitations contained in said section, then the Stipulation of Facts may not be considered judicial findings of a statutory violation. Accordingly, under the principle articulated in *Bakke* and quoted above, the state defendants herein have abridged unlawfully the petitioners' Fourteenth Amendment equal protection rights.

Conclusion.

For the reasons set forth in detail above, the Petitioners, Robert T. Devereaux, *et al.*, respectfully urge that the Court grant the instant writ.

Respectfully submitted,

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Appendix A.

Robert T. DEVERAUX, et al.,
Plaintiffs, Appellants,

v.

William J. GEARY, et al.,
Defendants, Appellees,

and

Plaintiff-Class in Culbreath v. Dukakis,
Intervenors-Appellees.

No. 84-2004.

United States Court of Appeals,
First Circuit.

Argued April 5, 1985.
Decided June 24, 1985.

Police officers brought action against officials of Metropolitan District Commission, challenging continued validity of consent decree entered in former action concerning racial discrimination in employment. Officials moved to dismiss and representatives of former class in former case moved to intervene. The United States District Court, for the District of Massachusetts, A. David Mazzone, J., 596 F.Supp. 1481, allowed motion to dismiss and allowed representatives' motion to intervene and plaintiffs appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that decision of United States Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, did not constitute an "unusual circumstance" permitting police officers to intervene.

Affirmed.

Federal Civil Procedure 337

Decision of United States Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, limiting district court's authority to impose new seniority system upon unwilling employer in contravention of existing bona fide seniority system does not constitute an "unusual circumstance" permitting police officers to intervene in employment discrimination action to secure modification of consent decree where original parties had voluntarily agreed to challenged provisions in consent decree and parties had stipulated that sufficient discriminatory patterns and practice existed to support Title VII action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ. Proc.Rule 24, 28 U.S.C.A.

Gabriel O. Dumont, Jr., Boston, Mass., with whom Grady, Dumont & Dwyer, Boston, Mass., was on brief for plaintiffs, appellants.

Charles J. Cooper, Deputy Asst. Atty. Gen., Michael A. Carvin and Mary E. Mann, Attys., Dept. of Justice, and Wm. Bradford Reynolds, Asst. Atty. Gen., Washington, D.C., were on brief for the U.S., amicus curiae.

Despena Fillios Billings, Asst. Atty. Gen., Boston, Mass., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass., was on brief for defendants-appellees.

James H. Wexler, Boston, Mass., with whom Herrick & Smith, Herman J. Smith, Jr., Boston University Legal Aid Program, Ilene Seidman and Ruth Diaz-Aguilar, Greater Boston Legal Services, Boston, Mass., were on brief for intervenors-appellees.

Jonathan M. Albano, Boston, Mass., with whom John F. Adkins, Bingham, Dana & Gould, Marjorie Heins, Massachusetts Civil Liberties Union Foundation, Barbara Arnwine, Lawyers' Committee for Civil Rights Under Law of the Boston

Bar Ass'n, Boston, Mass., William L. Robinson and Richard T. Seymour, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., were on brief for the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Ass'n, Civil Liberties Union of Massachusetts, and Lawyers' Committee for Civil Rights Under Law, amici curiae.

Before CAMPBELL, Chief Judge, BOWNES and BREYER, Circuit Judges.

LEVIN H. CAMPBELL, Chief Judge.

Plaintiffs, five non-minority members of the Metropolitan District Commission ("MDC") police force, appeal from a judgment of the United States District Court for the District of Massachusetts, 596 F.Supp. 1481, dismissing their complaint for failure to state a claim upon which relief could be granted after finding their attempt to intervene in the case of *Culbreath v. Dukakis* untimely.

The issue, whose resolution will decide the procedural as well as the substantive question before us, is whether the Supreme Court's decision in *Firefighters Local No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), requires us to read Title VII of the Civil Rights Act as prohibiting voluntary affirmative action efforts like those reflected in the *Culbreath* consent decree which benefit individuals who are not proven victims of actual discrimination. Arguing that *Stotts* compels such a reading, plaintiffs insist that they should be permitted to intervene in *Culbreath* in order to secure a modification of the consent decree.

We agree with the district court that *Stotts* (which dealt with a different situation) does not make it clear that the challenged consent decree is no longer lawful. The weight of circuit authority construes *Stotts* as not invalidating such a decree. Partic-

ularly as the challenged decree has only about two more years to run, and as the Supreme Court will soon hear a case that could clarify the issue, we decline to tamper with the *Culbreath* decree at this time. We affirm the judgment of the district court.

I.

This controversy has its roots in an action brought in 1974 by minority state employees against state officials. The minority employees, later certified as a class, sought to correct alleged historical and ongoing discriminatory hiring and promotional practices in the state civil service. *See Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980) (action originally brought *sub nom. Jackson v. Sargent*, No. 74-24633-MA). After two years of negotiations, the parties submitted a proposed stipulation of facts and consent decree to the district court. The stipulation stated that there was a disproportionate underemployment of minorities in certain state agencies and that such underemployment had been caused by employment practices engaged in, or perpetuated by, defendants. The stipulation represented,

> [t]he parties believe that the stipulation of facts set forth below and acknowledged by the Court constituted findings of past practices of discrimination of both a judicial and adminstrative nature, sufficient to sustain an action under Title VII of the Civil Rights Act of 1964, thereby providing sufficient grounds for the remedies set forth in the Decree.[1]

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[1] The plaintiff class in *Culbreath* originally grounded its claims on 42 U.S.C. §§ 1981, 1983, not on Title VII. About two years into the litigation, however, the Supreme Court ruled in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1979), that in section 1981 and section 1983 actions, plaintiffs must prove intentional discrimination to recover. Since the *Culbreath*

The *Culbreath* consent decree then set forth the terms of a negotiated settlement, including goals for the appointment and promotion of minorities in civil service job grades in the MDC for a period of eight years, beginning in January 1979 and ending in December 1987.

Between November 1978 and February 1979, more than four years after the action's commencement and contemporaneously with the submission of the proposed stipulation and decree, the Massachusetts Organization of State Engineers and Scientists, Locals 285 and 509, the Service Employees International Union, AFL-CIO, the Massachusetts Law Enforcement Council, and the National Association of Government Employees filed motions to intervene in *Culbreath*. After notice to the class, *see* Fed.R.Civ.P. 23(e), the district court held a hearing on the entry of the consent decree and the motions to intervene. In August 1979, the court denied the motions to intervene as untimely and entered the stipulation of facts and the consent decree.

This court upheld the district court's decision to deny the motions to intervene in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). We evaluated four factors that aid in determining whether intervention requests are "timely" under Fed.R.Civ.P. 23(1) the length of time the potential intervenors knew or reasonably should have known of their interest before they petitioned to intervene; (2) the prejudice to existing parties due to the potential intervenor's failure to petition for intervention promptly; (3) the prejudice the potential intervenors would suffer if they were not allowed to intervene; and (4) the existence of unusual circumstances militating either for or against

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complaint did not contain allegations of intentional discrimination, the parties in *Culbreath* treated the action as one brought pursuant to Title VII. For purposes of this appeal, it is clear that the *Culbreath* consent decree was entered under Title VII and must be reviewed accordingly. See note 2, *infra*.

intervention. *See id.* at 20-24. *See also Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 (5th Cir.1977). After finding that the would-be intervenors reasonably should have known of their interest four years before they petitioned to intervene, that they would not be prejudiced by denial of intervention, and that the parties' interests could be severely hampered if intervention were permitted, we concluded that the district court correctly found the intervention petitions untimely.

In July 1984, the instant action was brought by five white, male police lieutenants against William J. Geary, the Commissioner of the MDC, and Thomas E. Keogh, Superintendent of the MDC police force. Plaintiffs challenge the promotion of a black officer, Donald E. Callender, to a provisional position as an MDC police captain pursuant to the promotion guidelines of the consent decree. Specifically, they contend that although they all scored higher than Callender on the competitive examination administered to determine promotion eligibility, they were denied the opportunity to be considered for the position of temporary MDC police captain because of their race. They also state that ultimately one plaintiff who would have received the position had the consent decree not required that this position be filled by a minority was denied the position because of his race. They claim that by making race "the determinative selection factor," defendants deprived plaintiffs of their fourteenth amendment equal protection rights and violated 42 U.S.C. § 1981.

On August 8, 1984, defendants filed a motion to dismiss. On August 16, 1984, the *Culbreath* class filed a motion to intervene as a defendant, which was unopposed, and a motion to dismiss. After all parties submitted briefs on the motions to dismiss, the district court granted the class's motion to intervene and allowed defendants' motions to dismiss.

The district court chose to treat plaintiffs' complaint as a motion to intervene in *Culbreath*, rather than as an impermis-

sible collateral attack on the *Culbreath* consent decree. In addressing the timeliness of plaintiffs' attempt to intervene, the court found that but for the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, the situation before the court was the same as that before it when it denied the prior petitions to intervene in 1980. It ruled that absent *Stotts*, the *Stallworth* factors unambiguously required a denial of intervention and a dismissal of the case.

The issue, then, was whether the *Stotts* decision so changed the law of Title VII that it constituted an "unusual circumstance" militating for intervention[2] and, ultimately, for revision of the consent decree. The district court rejected plaintiffs' argument that the *Stotts* Court meant to rewrite Title VII law to make all affirmative action plans improper absent a finding of actual past discrimination. It noted,

> [h]ad the Court intended to radically change its interpretation of Title VII law so as to require a finding of actual discrimination in any affirmative action case, I believe it would have said so. In the absence of clearer authority, I decline to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide senority system. The plaintiffs here seek too broad a rule from too narrow a set of facts.

We concur in this analysis and accordingly affirm.

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[2] Plaintiffs argue that the fourth *Stallworth* factor, the existence of unusual circumstances militating for intervention, applies here. *See* page 270, *supra*. They contend that the Court's decision in *Stotts* changed the law of Title VII so as to render parts of the *Culbreath* consent decree invalid, and that the Court has expressly ordered that "when a change in the law [brings] the terms of a consent decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree." *Stotts*, ___ U.S. at ___ n. 9, 104 S.Ct. at 2587 n. 9 (citing *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 81 S.Ct. 368, 373, 5 L.Ed.2d 349 (1961)).

II.

In *Stotts*, a plaintiff class of black firefighters sued the Memphis, Tennessee, Fire Department and state officials alleging a pattern or practice of discrimination in hiring and promotion decisions in violation, among other provisions, of Title VII. A consent decree was entered into which had the stated purpose of remedying the Department's hiring and promotion practices with respect to blacks. The City, however, specifically indicated in the decree that it did not admit to "'any violations of law, rule or regulation with respect to the allegations'" in the complaint. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2581. Providing that minority membership in the Fire Department would be increased to approximate the proportion of minorities in the county labor force, the decree set as an interim hiring goal the filling of 50 percent of job vacancies annually with qualified black applicants. The decree did not, however, provide against the possibility of future layoffs. *Id.*

Nearly a year after the district court approved and entered the decree, the City announced that due to budget deficits, it would have to lay off a number of city personnel. The City declared that it would base the layoffs on the "last hired, first fired" rule provided for in a seniority system adopted pursuant to an earlier city-wide consent decree with the United States. *Id.* The district court, however, at the request of the class and over the objection of the City, entered an injunction forbidding the seniority-based layoffs. The court found that the layoffs would have a racially discriminatory effect, which rendered the otherwise valid seniority system not a "bona fide" one protected under Title VII. In response to this order, the City proposed and the court approved a modified plan requiring that layoffs be made in accordance with a racial quota designed to preserve the advances made through the consent decree in

increasing the proportion of black employees on the force. The layoffs were then carried out, and as a result of the court's order, certain non-minority employees with more seniority than minority employees were laid off or demoted in rank.

The Sixth Circuit affirmed the district court's order, although it held that the seniority system was a "bona fide" one. It concluded that the seniority-based layoffs would violate the terms of the consent decree by decreasing the percentage of minorities in the Department and that the district court therefore had the power to enforce the decree by ordering the modification of the seniority-based layoff system. Alternatively, the Sixth Circuit held that the district court's order was valid even if seen as a modification of the decree because new and unforeseen circumstances had created a hardship for one of the parties to the decree. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2583. The court rejected the argument that any modification was improper because it conflicted with a bona fide seniority system immunized from Title VII attack by section 703(h) of that Act. *Id.*

The Supreme Court reversed, ruling that the district court's injunction could not be justified either as an effort to enforce the consent decree or as a modification of the decree that could be forced on the City without its consent. The Court saw "the issue at the heart of the case" as "whether the district court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* at ___, 104 S.Ct. at 2584.

In resolving this question, the Court first pointed out that the "injunction does not merely enforce the agreement of the parties as reflected in the consent decree." *Id.* at ___, 104 S.Ct. at 2586.

The Court then turned to the question of whether the district court's order could be sustained as a valid modification of the

decree. *Id.* at ___ - ___, 104 S.Ct. at 2586-91. The Court relied on *System Federation No. 91 v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961) (a court, upon motion of a party, must modify a consent decree when a change in the law brings it into conflict with the objectives of the statute that authorized it), in ruling that a district court cannot modify a Title VII consent decree over the objection of one of the parties if the resulting order conflicts with the statute underlying the consent decree. *Stotts*, ___ U.S. at ___, n. 9, 104 S.Ct. at 2587 n. 9. The Court then found that the proposed modification conflicted with Title VII and that the district court's authority to impose a new seniority system upon an unwilling employer in contravention of an existing bona fide seniority system is therefore limited to situations where this relief is appropriate under Title VII, *i.e.*, when the individual plaintiffs can prove that they have been the actual victims of discriminatory practices.

In reaching this result, the Court relied upon its earlier decision involving section 703(h)[3] in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). In *Franks*, the Court had held that section 703(h) merely states that the operation of a bona fide seniority system will not constitute an illegal discriminatory employment practice, and does not bar retroactive awards of seniority as relief appropriate under section 706(g). The Court also relied upon

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[3] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

its ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), that an individual had to prove that a discriminatory practice had an impact on him before a court could award him retroactive seniority. The Court went on to state that "[o]ur ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII,[4] which affects the remedies available in Title VII litigation." *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2589 (footnotes omitted). The Court referred to statements made in the Title VII congressional debates in which the policy behind section 706(g) was "repeatedly expressed": "to provide make-whole relief only to those who have been actual victims of illegal discrimination." *Id.*

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[4] Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The contention that *Stotts* controls this case must be based on . ferences drawn from open-ended languaged in the *Stotts* opinion, as the facts and issues in *Stotts* are plainly distinguishable. Unlike the situation in *Stotts*, we are not concerned here with a district court's power over objection of one of the parties to the decree, to order retroactive relief that the consent decree never provided. Rather, the present plaintiffs challenge provisions in the consent decree to which the original parties had voluntarily agreed. Additionally, the affirmative action ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority system protected by section 703(h) of Title VII. Our case does not involve section 703(h) as there is no claimed conflict between a seniority plan and the remedies provided for in the decree.

A further distinction is that the parties to the *Stotts* decree had expressly disclaimed that the violations alleged in the complaint existed, whereas in this case the parties stipulated that discriminatory patterns and practices existed that were sufficient to support a Title VII action.

The above distinctions have been regarded as crucial by other circuits. *See EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985) (distinguishing *Stotts* because here there was no direct conflict with a bona fide seniority plan; the *Stotts* Court's decision involved the retroactive award of competitive seniority, not the prospective relief awarded here; and unlike *Stotts*, here there was a finding that plaintiffs intentionally discriminated against non-whites). *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486 (6th Cir.1985) (distinguishing *Stotts* on the facts and rejecting plaintiffs' argument that *Stotts* controls where voluntary plan did not directly deal with seniority). *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n. 5 (9th Cir.1985) (limiting *Stotts* to its facts). *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir.1984) (distinguishing *Stotts* because the instant case involved an af-

firmative action plan voluntarily applied by city at point of hiring and unrelated to seniority rights). *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-58 (6th Cir.1984) (*Stotts* does not affect affirmative action plan that "resulted from voluntary decisions in the collective bargaining process"), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985). *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir.1984) (distinguishing *Stotts* because here there is "no overriding of a bona fide seniority plan, and no requirement of race-conscious layoffs"), *cert. denied*, ___ U.S. ___, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985). *Grann v. City of Madison*, 738 F.2d 786, 795 n. 5 (7th Cir.) (distinguishing *Stotts* by stating that here, discrimination is acknowledged, the city defendant agreed to the relief provided, and this case involves promotions and pay, not seniority rights), *cert. denied*, ___ U.S. ___, 105 S.Ct. 296, 83 L.Ed.2d 231 (1984). *See also Hammon v. Barry*, 606 F.Supp. 1082, 1095 (D.D.C.1985) (rejecting suggestion that *Stotts* precludes use of any race-conscious affirmative action plan and distinguishing *Stotts* on ground that this is a voluntary plan that does not directly affect vested seniority rights). *Turner v. Orr*, 759 F.2d 817, 823-826 (11th Cir.1985) (distinguishing *Stotts* because this case did not involve infringement of a bona fide seniority system; no third party rights are involved here as no non-minority worker had to step down to accommodate a minority; and this case involves a consent judgment entered into by the parties). *NAACP v. Detroit Police Officers Association*, 591 F.Supp. 1194, 1202-03 (E.D. Mich.1984) (distinguishing *Stotts* on ground that it dealt with court-imposed affirmative action plan that did not by its terms deal with layoff question whereas the plan at bar was voluntary and explicitly adjusted seniority rights).

Plaintiffs argue that although *Stotts* may be factually distinguishable, the clear implication of the Court's language in *Stotts* outlaws the use of any race-conscious affirmative action plan.

We are not so sure. It is not easy to determine from the plurality opinion in *Stotts* just how far a majority of the Court would want to go in the present situation. Moreover, the Court had earlier held in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 486 (1979), that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalances in employment categories. The expansive reading of *Stotts* urged by plaintiffs would require us to find that *Stotts* overruled *Weber sub silentio*. In view of the importance of any such action, it seems likely that the Court would have directly addressed *Weber* if it had intended to overrule that decision. All the circuits considering the issue have concluded, in the absence of any express announcement to the contrary, that *Weber* reamins good law.[5] *See EEOC v. Local 638*, 753 F.2d at 1185-86; *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d at 487-88; *Diaz v. American Telephone*

[5] Although plaintiffs do not specifically raise the point, the fact that one of the parties to the consent decree challenged in this case is the City, a public employer, does not alter our analysis. The *Stotts* Court expressly declined to consider whether Title VII would prohibit the City of Memphis from voluntarily achieving the sames results as the district court's order in adopting an affirmative action plan. *Stotts*, ___ U.S. at ___, 104 S.Ct. at 2590. In the absence of a definitive ruling from the Court, we adhere to the precedent upholding the validity of voluntary affirmative action programs instituted by public employers. *See Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 227 n. 8 (2d Cir.1984) ("We reject Plaintiffs' contention that *Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 . . ., is inapplicable because the employer in *Weber* was a private entity whereas here it is a public entity."). *See also Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117 (2d Cir.1983) (applying *Weber*), *cert. denied*, ___ U.S. ___, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n. 18 (6th Cir.1983) (applying *Weber*), *cert. denied*, ___ U.S. ___, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); *Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 435 (2d Cir.1980) (applying *Weber*), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981). *Cf. Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9, 17 (1st Cir.1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974).

& Telegraph, 752 F.2d at 1360 n.5; *Van Aken v. Young*, 750 F.2d at 45; *Wygant v. Jackson Board of Education*, 746 F.2d at 158; *Kromnick v. School District of Philadelphia*, 739 F.2d at 911; *Grann v. City of Madison*, 738 F.2d at 795 n. 5.

We recognize, of course, that this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent. But this hardly seems the case or the moment for us to strike out in a new direction. The consent decree that plaintiffs wish to challenge has almost run its course, expiring by its own terms in 1987. Up to now people have relied on the decree as reflecting both the agreement of the parties and the command of a federal court. Unless we can say with greater certainty than is now possible that the decree, contrary to former assumptions, is invalid, it would seem better to leave it undisturbed, at least until the Supreme Court has shed more light in this area, which it quite possibly may do within the next term. *See Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir.1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985).[6]

Affirmed.

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[6] In *Wygant*, the Sixth Circuit held that a collective bargaining agreement that, as part of the school board's voluntary affirmative action plan, limited layoffs of minority group teachers in the event of reductions in staff, did not, despite the absence of direct findings of discrimination against minority teachers, violate the equal protection clause or Title VII. *See Wygant*, 746 F.2d 1152, certiorari granted ___ U.S. ___, 105 S.Ct. 2015, 85 L.Ed.2d 298. *See also* 53 U.S.L.W. 3692 (subject matter summary of case recently docketed). The Court granted certiorari to examine the question of whether the Constitution tolerates racial preferences for teacher layoffs adopted by a public employer, in the absence of findings of past discrimination, that are based solely upon the disparity between respective percentages of minority faculty members and students. *Id.*

Appendix B.

Robert T. DEVERAUX, et al.,
Plaintiffs,

v.

William J. GEARY, et al., Defendants.

Civ. A. No. 84-2181-MA.

United States District Court,
D. Massachusetts.

Nov. 7, 1984.

Police officers brought action against officials of Metropolitan District Commission, challenging continued validity of consent decree entered in former action concerning racial discrimination in employment. Officials moved to dismiss and representatives of class in former case moved to intervene. The District Court, Mazzone, J., held that: (1) case at bar was attempt to intervene in former case; (2) such attempt to intervene was untimely; and (3) representatives' motion to intervene would be allowed.

Motion to dismiss allowed; representatives' motion to intervene allowed.

1. Federal Civil Procedure 331

Separate suit which directly attacked consent decree in former discrimination case and sought to interfere with goals established by such decree was attempt to intervene in former case.

2. Federal Civil Procedure 2397.5

Title VII law was not so substantially changed by *Stotts* decision of Supreme Court as to invalidate existing consent decree which was designed to remedy alleged discriminatory employment practices by establishment of "annual minority hiring objective." Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A § 2000e et seq.

3. Federal Civil Procedure 320

Attempt by police officers to intervene in action, which had five years previously resulted in consent decree designed to remedy alleged discriminatory employment practices, was untimely.

4. Federal Civil Procedure 337

Where representatives on behalf of class in action which five years previously had resulted in consent decree designed to remedy alleged discriminatory employment practices had significant interest in outcome of employees' action challenging continued validity of such decree, resolution of case at bar in favor of employees would have substantially adverse impact on interests of class, and employees could not adequately represent interests of class, representatives' motion to intervene would be allowed. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.A.

Gabriel O. Dumont, Jr., Grady, Dumont & Dwyer, Boston, Mass., for plaintiffs.

Despena F. Billings, Asst. Atty. Gen., Boston, Mass., for defendants.

James H. Wexler, Herrick & Smith, Boston, Mass., for intervenors.

MEMORANDUM AND ORDER

MAZZONE, District Judge.

The issue in this procedurally complicated case is straightforward: does a recent Supreme Court decision so change Title VII law as to require modification of a five year old consent decree in a racial discrimination case? The plaintiffs in this case argue that the decision, *Firefighters Local Union No. 1784 v. Stotts*, ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) brings into question the validity of the consent decree in this and other affirmative action cases.

I.

The plaintiffs in this case are five white police officers employed by the Metropolitan District Commission (MDC), an agency of the Commonwealth of Massachusetts. On April 23, 1983, they took a competitive examination to determine their eligibility for promotion to captain. In early June, 1984, one temporary captain position became available. On July 6, 1984, Donald E. Callender (Callender), a black police officer, was awarded the position, although his score on the examination was lower than those of the plaintiffs. Callender was awarded the job as a result of the MDC's efforts to comply with the "minority employment objectives" established by a consent decree entered by this Court on August 27, 1979 in *Culbreath v. Dukakis* (D.Mass., No. 74-2463-MA). That consent decree entered in response to a class action brought by plaintiffs who alleged significant under-representation of minorities in several Massachusetts agencies, including the MDC. The decree included a stipulation that it was designed to remedy the widespread discriminatory employment practices alleged in the complaint.

The mechanics of the decree were as follows. Each affected state agency was to establish two separate civil service eligibility lists for each job title covered by the decree. The first list would be the usual list required by state law. The second would be a special minority eligibility list, from which the agency was to select applicants until the "annual minority hiring objective" for the job category and department was met.

In the present case, the MDC had failed to meet its annual minority hiring objective for the position of Provisional MDC Police Captain as of the date the position became available in June, 1984. The MDC apparently selected Callender from the special minority eligibility list in an effort to comply with the requirements of the consent decree.

The plaintiffs filed suit against William J. Geary, Commissioner of the MDC, and Thomas E. Keogh, Superintendent of the MDC (collectively, the defendants) on July 16, 1984. They claim that the defendants have violated their civil rights, specifically their right of equal protection as guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1981. But for their race, they claim, one of them would have been awarded the position given to Callender.

On August 8, 1984, the defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), claiming the following. First, this Court lacks jurisdiction because the Eleventh Amendment bars a federal court from ordering state officials to conform their actions to state law. The substance of the claim, they argue, is that the MDC officials did not comply with the state civil service hiring and promotion guidelines.[1] Second, the plaintiffs have failed to state a claim

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[1] In light of the disposition of this case made below, I do not reach the defendants' argument that this Court lacks jurisdiction due to the Eleventh Amendment.

upon which relief can be granted because (a) they lack standing; (b) the claims are barred by the doctrine of *res judicata;* and (c) the state defendants were complying with the *Culbreath* consent decree.

On August 16, 1984, representatives on behalf of the plaintiff class in *Culbreath* (the Class) moved to intervene pursuant to Fed.R.Civ.P. 24(a). The Class claims that it has a substantial interest relating to the subject of the litigation in that the ultimate relief sought by the plaintiffs would have the effect of vacating *Culbreath* and would therefore have a substantially adverse impact on the interests of the Class. It also claims that the present defendants cannot adequately represent the interests of the Class in this case. The Class filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), claiming that (a) the defendants' action was consistent with the consent decree and (b) the plaintiffs' claims are barred by the doctrine of *res judicata.*

On August 30, 1984, the plaintiffs filed their opposition to the defendants' motion to dismiss. To date, the plaintiffs have not opposed the motion of the Class to intervene in this case. The case is therefore before this Court on the defendants' motion to dismiss and the unopposed motion of the Class to intervene in this case.

II.

[1] Although filed as a separate suit, it is apparent that this suit is in essence an attack on the *Culbreath* consent decree. The plaintiffs themselves have stated:

> Assuming that the instant proceeding is more properly viewed as an effort to intervene in the *Culbreath* case, such intervention should be permitted. In this regard . . . *Stotts* represents a significant and substantial shift in Title VII law.

Plaintiffs' brief at 10. Both the defendants and the Class have filed memoranda arguing that this suit constitutes an attempt to intervene in the *Culbreath* case. Defendants' brief at 9; Class' brief at 3. Since the present action directly attacks this Court's order in *Culbreath* and seeks to interfere with the goals established by the consent decree, I find that it constitutes an attempt to intervene in that case. As such, this Court's decision is guided by the First Circuit opinion affirming this Court's refusal to permit a prior intervention in the *Culbreath* case. *Culbreath v. Dukakis*, 630 F.2d 15 (1980).

In that opinion, the court adopted the test set forth in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir.1977). *Stallworth* sets forth four factors to be considered in determining the propriety of permitting intervention: (1) the length of time the intervenor knew or reasonably should have known of his interest before he petitioned to intervene; (2) prejudice to existing parties due to the plaintiffs' failure to petition for intervention promptly; (3) the prejudice the plaintiffs would suffer if they are not allowed to intervene; and (4) the existence of unusual circumstances militating either for or against intervention. I treat these factors *seriatim*.

1. *Length of time the intervenor knew or reasonably should have known of this interest before he petitioned to intervene.*

The facts presently before this Court are virtually identical to those before the Circuit Court in 1980, with the exception of the existence of the *Stotts* opinion. It is clear that if it was unreasonable for the labor unions in that case to intervene more than four years after the complaint was filed, it is even more unreasonable to permit the plaintiffs to intervene now, more than ten years after the complaint was filed. In their brief, the plaintiffs make the puzzling statement that they "were

not potential intervenors" in *Culbreath*. Plaintiffs' brief at 10. The basis of this statement is not altogether clear to me. The brief states that the Massachusetts Law-Enforcement Council (MLEC), one of the unions barred from intervening in 1980, was no longer the official statewide law enforcement bargaining unit as of November 22, 1977. Even if MLEC did not represent police officers as of the date its petition to intervene was denied, the goals and mechanisms sought by the complaint in *Culbreath* were well publicized. *Culbreath*, 630 F.2d at 21. It is inconceivable that the plaintiffs did not previously know of the consent decree and its impact on their rights given that it has been five years since the decree was approved and implemented. The plaintiffs' brief offers no indication of why these police officers were not aware of and should not be bound by the *Culbreath* decree. Like the Circuit Court, I "see no excuse for the failure [of the plaintiffs] to learn of a suit and reported decisions so related to [their] promotion prospects. . . ." *Id.*

2. *Prejudice to existing parties due to the plaintiffs' failure to petition for intervention promptly.*

If the plaintiffs in this case are successful, the effect will be to disallow implementation of the consent decree. Nothing could more clearly prejudice the interests of the existing parties. The plaintiffs' success would constitute an extreme example of "last minute disruption of painstaking work by the parties and the court." *Id.* at 22 (citations omitted).

3. *The prejudice the plaintiffs would suffer if they are not allowed to intervene.*

Because the present plaintiffs' claims of prejudice are identical to those raised by the unions in the First Circuit's *Culbreath* decision, the discussion of this issue in that case is particularly helpful:

> The unions' second claim of prejudice, that the minority employment and promotion mechanisms of the consent decree violate the fourteenth amendment and sections 703(h) and (j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(h) and (j), has caused us more concern. While this is not an unusual argument in a race discrimination case, the tenuous posture of the unions gives it added importance. *If we affirm the district court's denial of intervention for untimeliness, the unions and their members may be forever foreclosed from challenging the goal mechanisms of the decree. Collateral attack on the decree will be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree. Intervention to modify the decree, the proper procedural recourse under the circumstances, will be barred by the doctrine of res judicata.*
>
> The essence of the timeliness determination, however, is whether the unions received such notice and opportunity to be heard as to satisfy the due process rights to be accorded persons so situated. The record shows that the district court entered the consent decree on August 27, 1979. We must assume that it determined that the settlement secured by the consent decree was fair, adequate and reasonable. *In reviewing the decree, the district court was undoubtedly aware that racial preference schemes are an accepted means of remedying past discrimination*

in our society. The only serious question before the district court would have been whether the stipulation of facts constituted a finding of past discrimination sufficient to justify the use of racial preferences at the expense of innocent persons. Although the entry of the consent decree does not constitute a finding of facts or a ruling of law, it is a determination of probability of success on the merits. Moreover, we note that none of the intervenors appear to have disputed the statistical evidence of racial discrimination in the employment and promotion practices of the defendant agencies. The stipulation of facts would have been a powerful and conclusive admission of the facts contained therein under Fed.R.Civ.P. 36(b). *Viewing these facts from a position considerably enhanced by our extensive exposure to the Massachusetts civil service system, we have no difficulty in upholding the district court's conclusion that plaintiffs enjoyed a substantial probability of success on the merits. We consider the prejudice flowing to the unions from denial of intervention to be as slight as the unions' probability of success on the merits of the issues they would raise upon intervention.*

Id. at 22-23, citations and footnote omitted. Absent some unusual circumstance, this holding in *Culbreath* must govern this case. I too find the prejudice to the plaintiffs flowing from denial of intervention to be as slight as their likelihood of success on the merits.

4. *The existence of some unusual circumstances militating either for or against intervention.*

This fourth and final consideration is at the heart of this case. The plaintiffs' argument is that the change in Title VII law made by *Stotts* is an unusual circumstance that requires

this Court to reconsider the validity of the consent decree. *See* Plaintiff's brief at 10. The basis of the present claim is as follows:

> As relates to the instant case, there can be no dispute that the *Culbreath* consent decree establishes racial quotas relative to the appointment of individuals to positions covered by the decree. In addition, the Stipulation of Facts in *Culbreath* indicates that the judicial authority for these quotas is founded on Title VII. Since . . . such quotas are no longer permissable [sic] under Title VII and since the Supreme Court has stated that the terms of a consent decree should be modified to reflect changes in applicable law, the *Culbreath* consent decree must be modified so as to eliminate the racial quotas and correspondingly any bar to the instant action.

Plaintiffs' brief at 9. This Court is therefore called upon to try to determine the scope of the holding in *Stotts*. I note that, to date, few other courts have faced this question.

The facts of *Stotts* are simple and familiar. The complaint in that case stated that officials of the City of Memphis were engaged in a pattern or practice of making hiring and promotion decisions on the basis of race in violation of Title VII of the Civil Rights Act and 42 U.S.C. §§ 1981 and 1983. The district court certified a class action and eventually approved a consent decree on April 25, 1980.

The decree adopted a long-term goal of increasing the proportion of minority representation in numerous job classifications. The City explicitly stated that it did not, by signing the decree, admit the allegations of the complaint concerning any violations of law. Neither the decree nor a prior, 1974 City-wide decree mentioned what was to happen in the event of

any layoffs or reductions in rank. Neither decree awarded any competitive seniority.

In 1981, projected budget deficits required the City to announce layoffs of nonessential personnel. These layoffs were to be made on the "last hired, first hired" [*sic*] rule applicable generally to all City employees. A black firefighter thereupon sought and received from the district court a temporary restraining order forbidding the layoff of any black employee. Shortly thereafter, the district court entered an injunction, noting that the decree did not contemplate the method to be used for reductions in rank or layoffs. The court explicitly found that the layoff policy was not adopted with any intent to discriminate, but that nonetheless it would have a racially discriminatory effect. The court ordered the City not to apply the seniority policy so as to decrease the percentage of black employees in several categories. Layoffs occurred in compliance with the injunction, and in some instances resulted in the layoff of non-minority employees with more seniority than minority employees.

The Court of Appeals for the Sixth Circuit affirmed, despite its conclusion that the district court was wrong in holding that the city's seniority system was not bona fide. On June 12, 1984, the Supreme Court reversed the judgment of the Court of Appeals.

The Supreme Court's discussion in *Stotts* is divided into two parts. Part A discusses the Circuit Court's finding that the injunction did no more than enforce the agreed-upon terms of the decree. The Court noted that the decree itself did not mention layoffs or demotions and there was no suggestion of any intention to depart from the existing system. In contrast, in the present case the express terms of the decree contemplate hiring conducted in exactly the way that occurred and for exactly the same reasons.

In the same part of the opinion, the *Stotts* Court at least implied that it still considered the affirmative action program instituted by the decree to be a permissible remedy under Title VII:

> The decree went on to provide the agreed-upon remedy, but as we have indicated, that remedy did not include the displacement of white employees with seniority over blacks. Furthermore, it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect.

Id., ___ U.S. ___, 104 S.Ct. at 2586. Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here. *See Culbreath*, 630 F.2d at 23, *citing United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979); *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir.1980); *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir.1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974). The clear implication of the above language is that the actual remedy that was provided by the decree was valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid.

Part B of the Court's opinion discussed the authority of the district court to modify the consent decree in light of unex-

pected layoffs. The Court found that the City's seniority system was a bona fide plan that did not have as its purpose an intent to discriminate on the basis of race. The Court then went on to discuss a district court's authority to contravene the provisions of such a bona fide plan in order to enforce Title VII rights. The Court reiterated its ruling in *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) that a district court may award *competitive seniority* only when the beneficiary of the award has actually been a victim of illegal discrimination. The Court went on to support the holding in that case by referring to the legislative history of Title VII. It quoted or cited the remarks of Senators Humphrey, Ervin, Hill, Robertson, Smathers, Stennis, Tower, Clark, and Case. *Id.*, ___ U.S. ___, 104 S.Ct. at 2589-90. At least some of those remarks, as the plaintiffs in this case have pointed out, are extremely broad reaching. Read literally they could be interpreted to require a finding of actual discrimination prior to entry of *any* affirmative action plan. The context of the Court's discussion, however, is a consideration of competitive seniority award. The Court did not question the validity of the underlying decree. Had the Court intended to radically change its interpretation of Title VII law so as to require a finding of actual discrimination in *any* affirmative action case, I believe it would have said so. In the absence of clearer authority, I decline to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide seniority system. The plaintiffs here seek too broad a rule from too narrow a set of facts.

[2, 3] In short, neither Part A nor Part B of the *Stotts* opinion supports the plaintiffs' claim in this case that Title VII law has so substantially changed as to invalidate the *Culbreath*

consent decree. *Stotts* is simply inapplicable to this case.[2] It therefore cannot form the kind of unusual circumstance that would militate in favor of granting a motion to intervene. As a result, I find that the plaintiffs' attempt to intervene in the *Culbreath* case by means of this complaint is untimely and must be denied. *See Culbreath*, 630 F.2d at 24. The defendants' motion to dismiss for failure to state a claim is therefore granted.

[4] Although the motion of the Class to intervene in this case might be considered moot in light of the above ruling, I consider the motion because the Class may wish to participate in any appellate review of this order. I find that the Class has a significant interest in the outcome of this action and that resolution of the case in favor of the plaintiffs would have a substantially adverse impact on the interests of the Class. I further find that the present state defendants cannot adequately represent the interests of the Class in this case. The motion to intervene is therefore allowed.

CONCLUSION

For the reasons stated above, the motion of the defendants to dismiss the case for failure to state a claim is allowed. The motion of the Class to intervene is allowed.

SO ORDERED.

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[2] I note that the Third Circuit recently discussed the continuing legality of an affirmative action program controlling the hiring of teachers in the Philadelphia public school system. *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir.1984). The opinion in that case implies that the court believed the holding in *Stotts* to be limited to situations involving seniority plans. *Id.* at 909-912. This decision by a Court of Appeals reinforces my belief that *Stotts* is inapplicable to the present case.

Appendix C.

AMENDMENT XIV.—CITIZENSHIP: PRIVILEGES AND IMMUNITIES: DUE PROCESS: EQUAL PROTECTION: APPORTIONMENT OF REPRESENTATION: DISQUALIFICATION OF OFFICERS: PUBLIC DEBT: ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 § 2000e

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allow-

able. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.